

**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS NUMBER: 04-0414**

**Sales/Use Tax**

**Periods of 2001 Through 2003**

**NOTICE:** Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUES**

**I. Sales/Use Tax: Donations**

**Authority:** IC 6-2.5-2-1; IC 6-2.5-3-1; IC 6-2.5-3-2; 45 IAC 2.2-3-15

The taxpayer protests the assessment of tax on donated carpet.

**STATEMENT OF FACTS**

The taxpayer sells carpet, remnants, and flooring. A letter was mailed to the taxpayer's representative on December 20, 2005, scheduling an administrative hearing for January 17, 2006. The taxpayer did not arrive, nor did the taxpayer telephone, at the scheduled hearing time. (The taxpayer's representative also did not arrive, nor did the representative telephone, at the scheduled hearing time). This Letter of Finding is written pursuant to the information in the file. More facts will be provided as needed below.

**I. Sales/Use Tax: Donations**

**DISCUSSION**

As noted, the taxpayer is in the carpet business. At issue are donations made by the taxpayer. The Auditor states:

Taxpayer is self-assessing use tax. The taxpayer however had donations during the audit period where use tax was not self-assessed. Taxpayer was the final consumer of the donations, which include carpet and remnants.

Information Bulletin #40 states that "Tangible personal property ... that is given away as a gift ... is subject to either sales or use tax. The person or organization liable for the tax is the person who gives the property away and not the person who receives the prize or gift." Information

Bulletin #40 further states, “Anyone purchasing tangible personal property to be given as a gift or prize should pay sales tax for the property at the time of purchase.”

In a letter to the Department, the taxpayer states that “Although [the taxpayer is] paying the assessment” that the taxpayer is “still protesting the audit findings.” The taxpayer in that correspondence then argues: (1) that the Information Bulletin cannot be used as a legal basis by the Department; and (2) that 45 IAC 2.2-5-55 makes a not-for-profit organization exempt. Regarding the taxpayer’s first contention, Information Bulletins are indeed for “non-technical assistance to the general public.” They provide assistance on frequently encountered issues. Information Bulletins do have a basis in the law—as Information Bulletin #40 makes clear it is derived from IC 6-2.5-2-1, IC 6-2.5-3-1, and IC 6-2.5-3-2.

IC 6-2.5-2-1 states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

And IC 6-2.5-3-1 states in part:

For purposes of this chapter:

- (a) "Use" means the exercise of any right or power of ownership over tangible personal property.
- (b) "Storage" means the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana.
- (c) "A retail merchant engaged in business in Indiana" includes any retail merchant who makes retail transactions in which a person acquires personal property or services for use, storage, or consumption in Indiana and who:
  - (1) maintains an office, place of distribution, sales location, sample location, warehouse, storage place, or other place of business which is located in Indiana and which the retail merchant maintains, occupies, or uses, either permanently or temporarily, either directly or indirectly, and either by the retail merchant or through a representative, agent, or subsidiary....

And finally IC 6-2.5-3-2 states in part:

- (a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Regarding 45 IAC 2.2-5-55 (as an earlier piece of correspondence to the taxpayer noted) applies to “Sales to a qualified not-for-profit,” not donations. Additionally, 45 IAC 2.2-5-55 applies to

the not-for-profit itself. What is at issue is whether the *taxpayer* owes the tax. 45 IAC 2.2-3-15 is the applicable regulation:

If any person who issues an exemption certificate in respect to the state gross retail tax or use tax and thereafter makes any use of the tangible personal property covered by such certificate, or in any way consumes, stores, or sells such tangible personal property, where such use, consumption, storage or sale is in a manner which is not permitted by such exemption, such use, consumption, or storage shall become subject to the use tax (or such sale shall become subject to the gross retail tax), and such person shall become liable for the tax or gross retail tax due thereon.

The taxpayer is a retail merchant that acquired property without paying sales tax. The taxpayer did not self-assess use tax on the property. The taxpayer then donated the property. Thus the taxpayer is liable for the tax. The taxpayer was also assessed a negligence penalty. The taxpayer did not develop any arguments regarding the penalty, and is thus denied on that issue as well.

### **FINDING**

The taxpayer's protest is denied.

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